

CITY COUNCIL AGENDA REPORT

**SUBJECT: FIRST AMENDMENT TO COMMUNICATIONS SITE LEASE
AREEMENT (TOWER)**

AGENDA DATE: October 7, 2008

PREPARED BY: Ralph Velez, City Manager

APPROVED FOR AGENDA BY: Ralph Velez, City Manager 

RECOMMENDATION: Recommend that City Council Approve the First Amendment to Communications Site Lease Agreement (Tower) with NEXTEL of California, Inc., a Delaware corporation, and authorize City Manager to execute lease.

FISCAL IMPACT: Not Applicable

BACKGROUND INFORMATION: (Prior action/information)

The City of Calexico and NEXTEL OF CALIFORNIA, INC, a Delaware corporation entered into a ground lease and tower license agreement dated June 25, 1998. Pursuant to the Agreement, the City of Calexico leased a portion of that certain real property located at 352 East First Street, Calexico, Assessor's Parcel Number 058-535-001-000. The current extension term of the Agreement expired on June 25, 2008.

Nextel requests to extend the term of the Agreement and amend certain provisions of the Agreement, as follows:

1. The term of the Agreement will be extended for two (2) additional renewal terms of five (5) years each. The Agreement will automatically be extended for each successive renewal term unless Nextel notifies the City of its intention not to renew.
2. The rent shall increase to Three Thousand dollars (\$3,000.00) per month, and in year two (2) of the extension term of the Amendment and each year thereafter, the yearly rent will increase by four percent (4%).
3. Nextel shall pay the City Thirty Nine Thousand Two Hundred Sixty and 60/100 dollars (\$39,260.60), which is Nextel's proportionate fair share of the costs of rehabilitation work that were paid for in advance by New Cingular Wireless PCS, LLC

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("Cingular"). The City will use the payment from Nextel to reimburse Cingular for the cost of the rehabilitation work.

4. The indemnity provision deletes the obligation of the City to defend and indemnify Nextel.

5. The insurance provision is amended to provide the City's standard insurance requirements.

Staff requests that the Council authorize the City Manager to execute this First Amendment to the Lease Agreement with Nextel.

DOCUMENTS ATTACHED:

1. Lease Agreement

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Site Name: Route 111
Site ID #: CA6417

FIRST AMENDMENT TO COMMUNICATIONS SITE LEASE AGREEMENT (TOWER)

This First Amendment ("Amendment") is made this _____ day of _____, 2008 ("Effective Date"), by and between the City of Calexico, a California Municipal Corporation ("Lessor"), and NEXTEL OF CALIFORNIA, INC, a Delaware corporation ("Lessee"), with reference to the facts set forth in the Recitals below.

RECITALS

A. Lessor is owner of that certain property commonly known as 352 First Street, City of Calexico, County of Imperial, State of California (the "Land") and a telecommunications tower (the "Tower"), the Land and the Tower are collectively the "Property".

B. Lessor and Lessee entered into that certain Communications Site Lease Agreement (Tower) dated June 25, 1998 ("Agreement"), pursuant to which Lessee is leasing from Lessor a portion of Lessor's Property.

C. Lessee and Lessor desire to extend the term of the Agreement and amend certain provisions of the Agreement, as set forth herein.

D. Lessor performed rehabilitation work on the Tower, the cost of which was fronted by New Cingular Wireless PCS, LLC. The rehabilitated condition of the Tower has benefited Lessee and Lessee agrees to pay for its proportionate fair share of the rehabilitation cost.

AGREEMENT

NOW, THEREFORE, in consideration of the facts contained in the Recitals above, mutual promises between the parties and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, Lessor and Lessee agree as follows:

1. **Term Extension.** Notwithstanding the provisions of Section 4 of the Agreement, the term of the Agreement will be extended for two (2) additional renewal terms of five (5) years each ("**Additional Renewal Terms**"), commencing upon expiration of the last remaining Renewal Term of the Agreement, under the same terms and conditions as are set forth therein, and as otherwise amended in this Amendment. The Agreement will automatically be extended for each successive Additional Renewal Term unless Lessee notifies Lessor of its intention not to renew prior to commencement of the succeeding Additional Renewal Term or otherwise terminated as provided for in Section 10 of the Agreement.

2. **Rent.** Section 5 of the Agreement is amended in its entirety to read as follows: "Within fifteen (15) days of execution of this Amendment and on the first day of each month thereafter, Lessee shall pay to Lessor as rent Three Thousand and 00/100 dollars (\$3,000.00) per month. In year two (2) of the extension term of this Amendment and each year thereafter, including throughout any Additional Renewal Terms exercised, the yearly rent will increase by four percent (4%) over the Rent paid during the previous year. Upon full execution of this Amendment to the Agreement, Lessee shall pay Lessor the sum of Four Thousand dollars (\$4000.00) as an incentive for Lessor to enter into this Amendment."

3. **Reimbursement for Rehabilitation Work.** Lessee shall pay Lessor within thirty (30) days of execution of this Amendment the amount of Thirty Nine Thousand Two Hundred Sixty and 60/100 dollars (\$39,260.60), which is Lessee's proportionate fair share of the costs of rehabilitation work that were paid for in advance by New Cingular Wireless PCS, LLC ("Cingular"). Lessor shall use the payment from Lessee to reimburse Cingular for the cost of the rehabilitation work.

4. **Insurance.** Section 12 of the Agreement is amended in its entirety to read as follows:

"(a) Lessee shall procure at its sole cost and expense, and keep in effect at all times until the end of the Term and any Additional Renewal Terms of this Agreement, Commercial General Liability Insurance applying to the use and lease of the Property, or any part thereof, and the business operated by Lessee, its sublessees, licensees, employees, agents, or any other occupant, on the Property. Such coverage shall have a minimum combined single limit of liability of at least Two Million Dollars (\$2,000,000). All such policies shall be written to apply to all bodily injury, property damage, personal injury and other covered loss, however occasioned, occurring during the policy term, shall be endorsed to add Lessor and its members, officers, employees and agents as additional insureds, and to provide that such coverage shall be primary and that any insurance maintained by Lessor shall be excess insurance only. Such coverage shall be endorsed to waive the insurer's rights of subrogation against Lessor.

(b) The Commercial General Liability insurance shall be in force the first day of the Term of this Agreement.

(c) Lessee shall also maintain Workers' Compensation insurance in accordance with California law, and an employer's liability insurance endorsement with customary limits. Any policy shall be endorsed with a waiver of subrogation clause for Lessor and its members, officers, employees, and agents.

(d) All insurance described in this Section shall be endorsed to provide Lessor with 30 days' advance notice of cancellation or change in its terms.

(e) If Lessee fails or refuses to maintain insurance as required hereunder, or fails to provide the proof of insurance, Lessor shall have the right to declare this Agreement in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies for breach of this Agreement. In addition, if Lessee shall fail to obtain any insurance required hereunder, Lessor may, at its election, obtain such insurance and Lessee shall, as additional rent, reimburse Lessor for the cost thereof plus a ten percent (10%) handling charge, within five (5) days following demand therefor."

5. Liability and Indemnity. Section 18 of the Agreement is amended in its entirety to read as follows: "Lessee shall indemnify, defend, protect, and hold harmless Lessor from and against any and all claims, losses, proceedings, damages, causes of action, liability, costs and expenses, (including attorneys' fees) arising from or in connection with, or caused by (i) any act, omission or negligence of Lessee or any sublessee of Lessee, or their respective contractors, licensees, invitees, agents, servants or employees, wheresoever the same may occur; (ii) any use of the Property, or any accident, injury, death or damage to any person or property occurring in, on or about the Property, or any part thereof, or from the conduct of Lessee's business or from any activity, work or thing done, permitted or suffered by Lessee or its sublessees, contractors, employees, or invitees, in or about the Property or elsewhere (other than arising as a result of Lessor's established sole negligence or willful misconduct); and (iii) any breach or default in the performance of any obligations on Lessee's part to be performed under the terms of this Agreement, or arising from any negligence of Lessee, or any such claim or any action or proceeding brought thereon; and in case any action or proceeding be brought against Lessor by reason of any such claim, Lessee upon notice from Lessor shall defend the same at Lessee's expense by counsel satisfactory to Lessor."

6. Notices. The first paragraph of Section 19(d) of the Agreement is amended in its entirety as follows: "All notices must be in writing and are effective only when deposited in the U.S. mail, return receipt requested and postage prepaid or when sent via overnight delivery service. Notices to Lessee are to be sent to: Sprint/Nextel Property Services, 310 Commerce, Irvine, CA 92602, with a mandatory copy to: Sprint/Nextel Law Department, Mailstop KSOPHT0101-Z2020, 6391 Sprint Parkway, Overland Park, Kansas 66251-2020, Attn.: Real Estate Attorney. Notices to Lessor are to be sent to: City of Calexico, 608 Herber Avenue, Calexico, CA 92231, Attn.: City Manager's Office."

7. General Terms and Conditions.

(a) All capitalized terms used in this Amendment, unless otherwise defined herein, will have the same meaning as the terms contained in the Agreement.

(b) In case of any inconsistencies between the terms and conditions contained in the Agreement and the terms and conditions contained in this Amendment, the terms and conditions of this Amendment shall control. Except as specifically modified by this Amendment, all of the terms and conditions of the Agreement shall remain in full force and effect. In addition, except as otherwise stated in this Amendment, all initially capitalized terms will have the same respective defined meaning stated in the Agreement. All captions are for reference purposes only and shall not be used in the construction or interpretation of this Amendment.

(c) This Amendment may be executed in duplicate counterparts, each of which will be deemed an original.

(d) Each of the parties represent and warrant that they have the right, power, legal capacity and authority to enter into and perform their respective obligations under this Amendment.

(e) Lessor agrees to execute and deliver to Lessee a Memorandum of Agreement in the form annexed to the Agreement as Exhibit C, as modified to show the Additional Renewal Terms and acknowledges that Lessee may record the Memorandum of Agreement in the official records of the County where the Site is located.

The parties have executed this Amendment as of the Effective Date.

Lessor:
CITY OF CALEXICO,
a California municipal corporation

Lessee:
NEXTEL OF CALIFORNIA, Inc., a Delaware corporation

By: _____
Signature
Name: _____
Print Name of Signatory
Title: _____
Print Title of Signatory
Date: _____

By: _____
Signature
Name: _____
Print Name of Signatory
Title: _____
Print Title of Signatory
Date: _____